THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 07.11.2007

+ **CONT.CAS No.190/2002 in CS(OS) 1572/1994**

JINENDER KUMAR ... Petitioner

- versus -

JAI KISHAN AGGARWAL ... Respondent

Advocates who appeared in this case:
For the Petitioner : Mr Arun Khosla with Ms Shreeanka Kakkar.
For the Respondent : Mr Nitin Mittal.

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED

1. Whether Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to the Reporter or not? YES
3. Whether the judgment should be reported in Digest? YES

BADAR DURREZ AHMED, J

1. This contempt petition has been filed on the allegation that the respondent (the alleged contemnor) has violated an undertaking given to this court on 28.01.2002. It is alleged that the respondent had undertaken that he would not carry out any unauthorised construction in the kiosk which was situated towards the south of Shop No.414, New

Lajpat Rai Market, Delhi which had been alloted to him by the MCD and which would result in obstructing free ingress and egress to the shop of the petitioner (Shop No.414, New Lajpat Rai Market) or in any manner interfere in the free flow of air and light to the said premises. The case of the petitioner is that the undertaking given by the respondent has been violated inasmuch as the respondent has extended the kiosk under his occupation and has exceeded the area of allotment. On the other hand, the respondent's case is that there has been no violation of the undertaking given before this court. It was firstly submitted that there has been no construction activity in respect of the said kiosk after 28.01.2002 and, in any event, no obstruction has been caused to the free ingress and egress to the shop of the petitioner and there has been no interference by the respondent in the free flow of air and light to the said premises.

2. The undertaking in question had been given by the respondent in suit No. 1572/1994 which had been filed by the petitioner against the respondent. The said undertaking dated 28.01.2002 which forms part of the settlement has been marked as Exhibit PW1/1 and the same reads as under :

"Suit No.1572/94

Statement of Jaikishan Aggarwal, s/o Shri Madan Lal, Aged 56 years, R/o 393, Kucha Bulaki Begum, Dariba Kalan, Delhi-6, on S.A.

I am the allottee of a kiosk towards south of Shop No. 414, South side Link Road of New Lajpat Rai Market, Delhi. At some distance shop No.414 of plaintiff Shri Jitender Kumar is situated. I undertake to the Court that I will not carry out any unauthorised construction in that kiosk allotted to me by the MCD which may result in obstructing free ingress and egress to the shop of the plaintiff or in any manner interfere in the free flow of air and light to the said premises. "

Exhibit PW1/2 is a certified copy of the order dated 28.01.2002 passed in IA. No.4808/2001 and suit No.1572/1994 on the basis of the said settlement and undertaking given by the respondent (defendant in the said suit). The order passed on 28.01.2002 (Exhibit PW1/2) indicates that the matter was listed before court on that date for arguments on the application (IA.No.4808/2001) filed by the defendant (respondent herein) under Order 7 Rule 11 CPC. It was noted that before arguments on the application could commence, the defendant had made a statement which had been recorded separately and wherein the defendant (respondent herein) had stated that he would not carry out any unauthorised construction in the kiosk allotted to him which may obstruct free ingress and egress to the shop of the plaintiff (petitioner

herein). In view of the statement made by the defendant (respondent herein), the suit was withdrawn by the plaintiff (petitioner herein) and the same was dismissed as withdrawn by the said order dated 28.01.2002.

3. It is also relevant to note the order dated 02.09.2005 passed by this court in this contempt petition. A reading of the said order indicates that the suit (CS(OS) 1572/1994) had been filed for mandatory injunction by the petitioner (herein) against the respondent alleging that unauthorised construction had been carried out by the respondent in the said kiosk. It was also noted that the defendant (respondent herein) had given the said undertaking of 28.01.2002. The petitioner had alleged in this petition that the respondent had carried out unauthorised construction in violation of the undertaking given to the court. It was also noted in the order dated 02.09.2005 that the court had directed the petitioner to file a detailed affidavit in respect of the allegations. Consequent to such a direction, the petitioner had filed a supplementary affidavit on 05.02.2005 wherein the plea was taken that the unauthorised construction was carried out by the respondent on the night intervening 21-22/08/2002. The order notes that this fact was disputed by the

learned counsel for the respondent. In this background, the court observed :

> "Obviously this is a question of fact which can not be decided without evidence. Petitioner shall file affidavits of their witnesses by way of examination-in-chief within two weeks. Respondent shall file affidavit of their witnesses by way of examination-in-chief within two weeks thereafter.
>
> List before the Joint Registrar on 7th November, 2005 for recording the cross-examination of witnesses."

Pursuant thereto, the petitioner examined three witnesses :

1. Jinender Kumar (PW1) (petitioner himself)
2. Sanjay Gupta (PW2)
3. Dinesh Kumar (Licensing Inspector, City Zone, MCD)

On the other hand, the respondent examined three witnesses :

1. Jai Kishan Aggarwal (RW1) (the respondent)
2. Prabhat Gupta (RW2)
3. Chhiteshwar Prasad (RW3).

4. Apart from the aforesaid witnesses, the parties also produced documentary evidence which shall be dealt with in the course of the discussion below. However, at this stage, it must be mentioned that the petitioner was allowed an adjournment for the production and examination of his witness (Mr Dinesh Kumar) by an order dated

03.10.2006 subject to payment of costs of Rs 10,000/-. It has been pointed out by the learned counsel for the respondent that the costs of Rs 10,000/- have not been paid / deposited by the petitioner, as directed by this court. Consequently, the evidence of Mr Dinesh Kumar cannot be looked into. This aspect of the matter shall also be dealt with hereinbelow.

5. The entire controversy is with regard to the alleged violation of the undertaking given by the respondent to this court on 28.01.2002. Mr Arun Khosla, the learned counsel appearing on behalf of the petitioner, submitted that there was a clear violation of this undertaking given to the court and, therefore, the respondent was guilty of contempt and was, accordingly, liable to be punished for the same. He submitted, with reference to the examination-in-chief of the witness Dinesh Kumar (the Licensing Inspector, City Zone, MCD) and who apparently produced the summoned record, that the MCD had alloted the kiosk in question to the respondent on 20.09.1983 and that a site plan of the kiosk had been handed over to the respondent at the time of the allotment. He further submitted that the said witness also stated that the location of the kiosk was changed by a letter 26.12.1983 (Exhibit PW2/B). The said

witness further stated by a letter dated 02.04.2004 permission was granted to the respondent to extend the size of the kiosk to 7' x 5' under the physically handicapped scheme. The letter dated 02.04.2004 was marked as Exhibit PW2/C. Referring to the aforesaid statements made by the witness (Dinesh Kumar), the learned counsel for the petitioner submitted that the case of the respondent that no change had been brought about in the kiosk since 1983 stands belied because, according to the said witness, the location of the kiosk was changed in December, 1983 by virtue of the letter dated 26.12.1983 and that by virtue of the letter dated 02.04.2004 permission had been granted for extension of the size of the kiosk to 7' x 5' (Exhibit PW2/C). However, this contention of the learned counsel for the petitioner can be straightaway repelled by noting that the purported change of the location took place in 1983 itself. Secondly, the permission granted for extension of size of the kiosk was in the year 2004, much after the present contempt petition had been filed. The contempt petition had been filed on 28.12.2002. Therefore, the question of change of location in 1983 and the permission for extension in size granted in 2004 have no bearing on the issues at hand. The learned counsel for the petitioner then submitted that, in view of the statement made by the witnesses Mr Dinesh Kumar, a site plan of the

kiosk had been handed over to the respondent in 1983. It was incumbent upon the respondent to have produced that site plan before this court to show that the existing structure was in accordance with the said site plan so as to obviate any dispute with regard to the allegation of unauthorised construction. He submitted that the fact that the site plan was not produced by the respondent would have to be read against the respondent.

6. The learned counsel for the petitioner then referred to the complaint made by the petitioner to the MCD on 03.09.2002 (Exhibit PW1/5). He also referred to the counter affidavit of the respondent where the respondent had stated that no extension had been made to the kiosk till date implying thereby that there was no construction carried out by the respondent in the kiosk after 1983. The learned counsel also referred to a general plan given for the kiosk by the MCD. The said plan has been annexed as Ex. PW1/3. The learned counsel then referred to the evidence affidavit of PW1 (the petitioner himself) and made specific references to paragraphs 5, 6, 8, 9 and 10. In paragraph 9 it was alleged that the original dimensions of the kiosk had been restored at the time of the suit / undertaking on 28.01.2002 but the same had been again altered

thereafter and it is for this reason that the contempt petition has been filed. There is an allegation contained in paragraph 10 of the said evidence affidavit of PW1 that the construction activity was noticed at the kiosk on 21.08.2002 and by the morning of 22.08.2002, the construction had been completed throughout the night and the size of the kiosk had been enlarged to 9' x 10'.

7. The evidence of PW2 (Sanjay Gupta), a person working at the nearby Rajdhani Guest House, was also referred to. In paragraph 4 of the affidavit of the said Sanjay Gupta, it is stated that on 21.08.2002 at about 10.30 p.m he saw some construction activity taking place at the respondent's kiosk. The learned counsel for the petitioner then referred to the cross examination of the respondents' witnesses. Referring to the cross examination of Mr Jai Kishan Aggarwal (RW1), he submitted that the said witness introduced a new concept of carpet area. However, there was no such concept earlier. He submitted that the witness also stated that there was no unauthorised construction since 1983 and there was no change in the kiosk allotted to him. He also submitted that the said witness, in cross examination, stated that there was no alternation or construction carried out on 21.08.2002. According to the learned

counsel for the petitioner these statements are blatant lies in view of the clear evidence of the witness Dinesh Kumar of the MCD. With regard to the cross examination of Prabhat Gupta (RW2), he submitted that the cross examination reveals that the evidence affidavit filed by the said witness was not confirmed before an Oath Commissioner and, therefore, the said evidence of this witness cannot be looked into at all. He submitted that, in any event, this witness has also repeated the stand taken by the respondent that there was no change in the kiosk for the last 20-25 years. Referring to the cross examination of Mr Chhiteshwar Prasad (RW3), the learned counsel submitted that the same statement is repeated of there being no alternation or addition in the kiosk for the last 20-25 years. He then referred to Exhibit PW1/7 which is an affidavit of an official of the Assistant Commissioner of MCD given in another matter. He submitted that this affidavit is also a self-serving affidavit and no-reliance can be placed on the same. He submitted that the statement that the measurement of the kiosk as on date and as in 1983 was the same, cannot be relied upon. Even the plan annexed to this affidavit shows the dimensions of the kiosk as being different from the original allotted dimensions. The learned counsel, therefore, submitted that the evidence regarding construction given by the petitioner's

witnesses is unchallenged as there was no suggestion to the contrary given in the course of their cross examination. He also submitted that the evidence of the respondent that there was no change in the dimensions of the kiosk since 1983 is falsified by the fact that the MCD permitted changes, the evidence of the PWs is to the contrary and that the evidence of the RWs cannot be believed. In fact he went on to say that the witnesses produced on behalf of the respondent are guilty of perjury.

8. In response to the arguments advanced by the learned counsel for the petitioner, Mr Nitin Mittal, who appears on behalf of the respondent, submitted that nowhere in the contempt petition has it been stated that there was any construction activity on 21.08.2002. This contempt petition was filed on 28.01.2002. For the first time, the story of construction having been carried out on 21.08.2002 was introduced in the supplementary affidavit filed on behalf of the petitioner on 05.02.2003. The learned counsel then drew the attention of the court to three exhibits PW1/4, PW1/5 and PW1/6 which are letters purportedly written on 23.08.2002, 03.09.2002 and 10.09.2002 and which find reference in paragraph 7 of the contempt petition. These were purported complaints written by the petitioner to the MCD with regard to the

alleged unauthorised construction carried out by the respondent. Mr Mittal submitted that in none of the three letters, is it mentioned that there was any construction carried out on 21.08.2002. The allegations contained in these letters are general and vague. He submits that even the dates in each of the letters have been interpolated. In Exhibit PW1/4, the original date was typed as 12.08.2002. The same has been changed by pen to read 23.08.2002. With regard to exhibit PW1/5, the date has been changed from 02.09.2002 to 03.09.2002 and with regard to exhibit PW1/6, the date has been changed from 09.09.2002 to 10.09.2002.

9. Mr Mittal then referred to Exhibit PW1/7 which is the affidavit of MCD official (Mr Harbhajan Singh) in another case. Reading the affidavit, he submitted that the petitioner's conduct has been described as malafide and that it was the petitioner who was the encroacher and not the respondent. Referring to the undertaking (Exhibit PW1/1), Mr Mittal submitted that the undertaking is in two parts. The first part pertains to unauthorised construction and the second part pertains to obstructing free ingress and egress. He submitted that for a contempt to be made out, there must be both unauthorised construction as well as obstruction with regard to free ingress and egress. As regards

free ingress and egress, there is no mention in the contempt petition that the same had been obstructed by any activity on the part of the respondent. In this context, Mr Mittal drew the attention of the court to the cross examination of PW1 wherein he has stated that the location of the kiosk is towards the South of his shop (shop No. 414). It has also been stated by the said witness that there is no door towards south and the gate of the petitioner's shop is on the West, towards Esplanade Road. It has also come in cross examination that the distance between the petitioner's shop and the respondent's kiosk has remained the same since 1983. Referring to these statements of the respondent (RW1), Mr Mittal submitted that there is no question of any violation of the said undertaking as the ingress or egress of the respondent has admittedly not been obstructed. He also referred to the cross examination of PW1 to submit that even the measurement which supposedly the petitioner took was not by measuring tape but by footsteps as admitted by the said witness. Therefore, the entire case of unauthorised construction has been built up on the basis of mere allegations without there being any substance. He also submitted that in his cross examination, the said PW1 has stated that on 22.08.2002 there was a holiday and the MCD office was closed on account thereof. However, the learned counsel submitted

that subsequently under the Right to Information Act, information has been received that on 22.08.2002 there was no holiday of the MCD office. He submitted that although this information has been received after the closure of evidence, judicial notice of the same could be taken.

10. Mr Mittal then referred to the cross examination of PW2 and, particularly, to the portion where the said witness was asked to give the details of the construction and to which he replied that he could not give the details. He also mentioned that the said witness PW2 was an interested witness. To substantiate this, Mr Mittal referred to Exhibit DX-2 which is a conveyance deed pertaining to the petitioner in which the said Sanjay Gupta (PW2) was a witness. Mr Mittal then referred to the evidence affidavit of the petitioner (PW1) and, in particular, paragraph 10 thereof wherein there is the narration of the events which took place on 21.08.2002 and 22.08.2002. The affidavit has clear reference to the fact that the petitioner ran across to one Mr Pankaj Sharma and notified him of the construction going on. However, the said Mr Pankaj Sharma has not been produced by the petitioner. He submitted that the said Mr Pankaj Sharma would have been the best witness to have supported the petitioner's case. The non-production of

Mr Pankaj Sharma and the production of PW2 (Mr Sanjay Gupta) who was not even named in the evidence affidavit of PW1 is itself an indicator that the petitioner's case has no legs to stand on. He submitted that Mr Sanjay Gupta was not even present at the site. Reference was also made by Mr Mittal to exhibits DW1/2 and DW1/3 which are affidavits of MCD officials given in different matters involving the petitioner and the respondent and the MCD. In Exhibit DW1/2 dated 21.04.1995, it is indicated in paragraph 3 that the kiosk of the respondent is at the same place as it was at the time of allotment. Exhibit DW1/3 which is an affidavit of one Kumar Swamy also indicates at paragraph 4 thereof that the kiosk of the respondent is of the same size as on 1983. This affidavit was given on 15.09.1999. The learned counsel for the respondent, therefore, submitted that there has been no change and or any unauthorised construction in the kiosk. He further submitted that the permission that was granted for extension on 02.04.2004 (Exhibit PW2/C), could not have been granted had there been any existing violation. He submits that this is also a factor to be considered by this court that the MCD does not grant permission for any alternation or extension in respect of the premises where there exists unauthorised construction. This in itself is a pointer to the fact that when the

permission was granted on 02.04.2004, there was no existing violation of the terms of allotment of the kiosk.

11. With regard to the affidavit of Mr Prabhat Gupta (RW2) not having been confirmed before the Oath Commissioner, Mr Mittal submitted that this is not a serious defect. The fact remains that the affidavit was tendered in court and that the said Mr Prabhat Gupta was cross examined in court. Therefore, his testimony can be relied upon. Mr Prabhat Gupta has clearly and categorically stated that no construction activity was noticed by him in the kiosk since its existence. The said Mr Prabhat Gupta is also a natural witness and his shop is opposite to the site in question. He submitted that even RW3 (Chhiteshwar Prasad) is a reliable witness as he was the General Secretary of New Lajpat Rai Market Patri Hawkers' Union and he has also stated that there was no construction activity. It was moreover contended on behalf of the learned counsel for the respondent that the police was not at all called when the alleged construction activity was noticed by the petitioner. Even the cross examination of PW1, with regard to this aspect of the matter, demonstrates that the said witness was evasive.

12. In the light of these submissions, the learned counsel for the respondent submitted that no case for contempt had been made out and the respondent ought to be discharged.

13. It must be remembered that the standard of proof required to establish a change of contempt, criminal or civil, is that it has to be proved beyond reasonable doubt. This has been held by the Supreme court in a series of decisions including:-

(1) ***S. Abdul Karim v M.K. Prakash*: (1976) 1 SCC 975 (at page 981)**;

(2) ***Mrityunjoy Das v Sayed Hasibur Rahaman*: (2001) 3 SCC 739 (at page 746)**;

(3) ***Chhotu Ram v Urvashi Gulati*: (2001) 7 SCC 530 (at page 532)**;

(4) ***Anil Ratan Sankar v Hirak Ghosh*: (2002) 4 SCC 21 (at page 30)**;

(5) ***Bijoy Kumar Mahanty v Jadu*: (2003) 1 SCC 644 (at page 647)**;

(6) ***Biman Bose v State of W.B.*: (2004) 13 SCC 95 (at page 97)**.

Having considered the arguments advanced by the counsel for the parties and having gone through the entire evidence, I am also of the view that

the contempt is not made out. There are various reasons for arriving at this conclusion.

14. First of all, the contempt petition did not mention that the construction activity was carried out on 21.08.2002 and 22.08.2002. The contempt petition had been filed on 28.01.2002. The allegations of construction having been carried out on the night intervening of 21st and 22nd August, 2002 was introduced for the first time by the petitioner in the supplementary affidavit which was filed over two years later on (05.02.2005). This in itself creates an element of doubt with regard to the petitioner's allegation of construction having been carried out by the respondent on 21-22/08/2002.

15. Secondly, the petitioner has not alleged in the contempt petition as in what manner the respondent has obstructed the free ingress and egress to the petitioner's shop or in what manner the respondent has interfered with the free flow of air and light to the said premises. In fact, there is no direct allegation contained in the contempt petition in this regard. Even the evidence does not disclose any obstruction having been set up by the respondent with regard to the ingress and egress. On the

contrary, the petitioner (PW1) has admitted in cross examination that the location of the kiosk in question is towards the south of his shop and that no door of the shop opens towards the south. The opening of his shop is, on the other hand, towards the west, facing Esplanade Road. He has also admitted that the distance between his shop and the kiosk is 6' and it has remained the same since 1983. There is no evidence to show that the passage between the kiosk and the petitioner's shop has been encroached upon by the petitioner in any manner. Consequently, there is nothing on record to show that the respondent had, in any manner, obstructed the free ingress and egress to and fro of the petitioner's shop.

16. Thirdly, and most importantly, three documents marked as Exhibits PW1/4, PW1/5 and PW1/6 completely belie the case sought to be set up by the petitioner. These are the documents which were allegedly sent by the petitioner to the MCD by way of complaints against the alleged unauthorised activity of the respondent. Exhibit PW1/4 purports to be a letter which is dated 23.08.2002. The material portion of the letter reads as under :

> "Respected Sir,
>
> It is very kindly prayed that I am in litigation with Jaikishan Aggarwal the owner of Kiosk on the South side wall of my shop on Foot Path size bearing

(6'x5') as the size receipt produced in the court, and in the above stated suit Mr Jaikishan Aggarwal has given the undertaking in the Hon'ble High Court that he will not raise any unauthorised construction in his kiosk. But he has fully encroached the kiosk from (5'x6') alloted size enlarging and constructing unauthorised in to zie (9'x10') app and (10'x10') shed all around kiosk and extending the kiosk towards the tree there making narrow the street between tree and kiosk by obstructing ingress and egress.

It is very kindly prayed accordingly to take the necessary action against the contemner. Copy of the Hon'ble High Court orders is self explanatory and attached herewith."

17. It is important to note that the date of the letter has been changed as mentioned above. The date as printed was `12.08.2002'. It was altered by pen to read '23.08.2002'. There is no doubt that the said letter was received at the MCD office on 23.08.2002. If the letter was first typed out on 12.08.2002, as indicated by the date printed initially, then it could not have referred to the incidents of 21-22/08/2002. On the other hand, if the letter was written and typed out on 23.08.2002 then the contents would have definitely disclosed that a couple of days ago i.e., on 21-22/08/2002 the respondent had carried out the unauthorised construction. The alleged incidents of 21-22/08/2002 are conspicuous by their absence. The contents of the letter Exhibit PW1/4 have been virtually replicated in Exhibits PW1/5 and PW1/6. In none of these

letters is there any mention of the alleged events of 21-22/08/2002. The conclusion, therefore, is that there was no construction carried out on the night intervening 21-22/08/2002. It must be remembered that by virtue of the order dated 02.09.2005, passed in this petition, evidence was required to be led to determine whether there was any construction on 21-22/08/2002. It was this question of fact which was required to be determined by allowing the parties to lead evidence. The evidence on record clearly establishes that there was no such incident. In fact, the change of date on Exhibit PW1/4 completely demolishes the story set up by the petitioner of there being unauthorised construction on 21-22/08/2002.

18. Taking an overall view of the matter, I feel that the testimony of PW1 as also PW2 cannot be believed with regard to the allegations of unauthorised construction. As regards the non production of the site plan of the kiosk handed over to the respondent, no advantage can be taken by the petitioner because it is the petitioner's case that has to be established. The petitioner has been unable to prove beyond reasonable doubt that there was any construction activity carried out by the respondent at the kiosk in question on 21-22/08/2002. This is the conclusion even if the

evidence of Dinesh Kumar is taken into account. The non production of the site plan of 1983 by the respondent would also be of no consequence.

The contempt petition is, therefore, dismissed.

BADAR DURREZ AHMED
(JUDGE)

November 7, 2007
M